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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 48.

LOUIS H. PINK, Superintendent of Insurance of the State of New York,
Petitioner,

vs.

A. A. A. HIGHWAY EXPRESS, INC., H. A. ADAMS, Trading as ADAMS TRANSFER COMPANY, H. L. BASS, as BASS BUS LINE, ATLANTA MACON MOTOR EXPRESS, INC., COX BROS. COMPANY, CONTINENTAL CARRIERS, INC., KALER PRODUCE CO., SOUTHEASTERN MOTOR LINES, INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Georgia.

BRIEF OF RESPONDENTS.

I.

FULL FAITH AND CREDIT NOT DENIED PETITIONER; THIS COURT SHOULD DECLINE JURISDICTION.

The petitioner cites the failure of the Supreme Court of Georgia to enforce against respondents the assessment orders and decrees of the Supreme Court of New York

as being a denial of full faith and credit due to judgments of a sister state under guaranty of Article IV, Section 1, of the Constitution of the United States. The Master's report in the New York proceedings relied on by petitioner clearly holds that the assessment fixed in the New York courts does not have the binding effect of a judgment as against nonresident policyholders. In Re: **Auto Mutual Indemnity Company**, 14 N. Y. S. (2nd) 601. Headnote 16 reads as follows:

> "Where non-resident policyholders of insolvent mutual automobile casualty company had not been served with process within the jurisdiction and had not appeared generally in filing objections to jurisdiction of trial court to order them to show cause why an assessment should not be paid, a personal judgment for payment of assessment would not be ordered against such policyholders although they were bound by the finding of necessity for the assessment and amount thereof."

The opinion under paragraph 16 reads as follows:

> "These rules of law are equally applicable in the case of policyholders in a mutual insurance company. Accordingly no personal judgment will be ordered against non-resident members or policyholders who have not appeared generally or been served personally with process within the State, although, as hereinabove set forth, they are bound by the finding of the necessity for the assessment and the amount thereof."

We deem it unnecessary to cite more than one authority to the effect that a person is not bound by the judgment of a court where the requirements of "due process" of law have not been accorded to him. **Pennoyer v. Neff**, 95 U. S. 733. It is not contended on the part of petitioner that these respondents were served in the New York proceedings. Therefore, there is no decree or judgment of the New York courts to be given full faith and credit. In its

opinion, under review here, the Georgia Supreme Court says (R. 90):

> "That before that constitutional provision (full faith and credit clause) can become operative, one must have had his day in court; and over against it we place the other guaranty, to wit, the due process clause; and it is of the essence of due process that one must be given an opportunity to be heard."

This court in the case of **Wisconsin v. Pelican Insurance Company**, 127 U. S. 471, 32 L. Ed. 239, examined carefully the requirements of full faith and credit as to judgments of sister states. It is held that Article IV, Section 1, of the Constitution establishes a rule of evidence rather than of jurisdiction and that it does not affect the jurisdiction either of the court in which the judgment is rendered or of the court in which it is offered in evidence.

In the case of **Bagley v. General Fire Extinguisher Company**, 53 L. Ed. 605, 212 U. S. 477, this court discusses the full faith and credit contention as regards a Michigan judgment. The decision rules:

> "The defendant was no party to that judgment and there is nothing in the constitution to give it any force as against strangers."

The court holds further (this being also applicable in our case):

> "Even if wrong, it did not deny the Michigan judgments their full effect, **but denied the preliminary relation between the defendant and the party to them.**"

In the case at bar the sole question is the interpretation of an insurance contract. It has been held by this court:

> "It is manifest that the question of the proper construction of this contract being non Federal in its

nature, is not subject to review and we consequently assume that the construction was correct."

Commercial Publishing Company v. Samuel C. Beckwith, 188 U. S. 567, 47 L. Ed. 598.

As enunciated by the Supreme Court of Georgia, the full faith and credit clause of the Constitution must be construed in connection with the due process of law provision of the same. It has been many times held that due process of law is denied by the action of a state court **in according** full faith and credit to a judgment in personam by a court of a sister state against a nonresident who was not personally served. **Old Wayne Mutual Life Association v. Sarah McDonough,** 204 U. S., page 8, 51 L. Ed., page 345. See, also, **Burton O. Wetmore v. James L. Karrick,** 205 U. S. 141, and 51 L. Ed. 745.

The Supreme Court of Georgia, applying applicable, Statutory Law of Georgia, construed the policy issued to these respondents to be, according to its terms, nonassessable. This construction cannot be enlarged by giving extraterritorial effect to the New York statutes. In this connection we would refer the court to the case of **Pacific Employer's Insurance Company v. Industrial Accident Commission of California,** 306 U. S. 493, 83 L. Ed. 943.

II.

THE ACTION IS NOT AN ACTION FOR UNPAID PREMIUMS.

On page 2 of his brief opposing counsel submits that this action sought to recover assessments, and also unpaid premiums. The Supreme Court of Georgia evidently construed the petition to seek recovery only of assessments, and plaintiff's petition seems to justify that construction. Paragraph 15 of plaintiff's petition as amended (R. 19)

shows that petitioner was seeking to sustain the joinder of parties defendant upon the basis of assessments. It does not appear that unpaid premiums were even alleged against a great many of the defendants.

Neither does it appear that the matter of recovery of premiums was urged before the Supreme Court of Georgia until after its decision had been rendered, petitioner then complaining of it in his motion for a rehearing, which is supposed to cover only matters urged before the court and overlooked by it.

That the petition sought to recover assessments only we think appears from a reference to the following paragraphs of plaintiff's petition: Paragraph six (R. 8), Paragraph eight (R. 8), Paragraph nine (R. 9), Paragraph fourteen (R. 10), and Paragraph fifteen of the amended petition (R. 19).

The prayers of plaintiff's petition (R. 18) do not mention premiums, nor do the prayers of the amended petition (R. 19).

Neither do we find any specific statement that the account based on unpaid premiums was "correct, past due and unpaid."

III.

THE SOLE QUESTION INVOLVED.

Counsel for petitioner, in his very comprehensive brief, quotes from many cases, of this and other courts, to support certain principles of law which neither respondent nor the Supreme Court of Georgia in this case has ever questioned.

We call particular attention to the outstanding princi-

ple upon which all are agreed, to wit: The courts of Georgia are bound by the decisions and decrees of the New York courts regarding the necessity for, and amounts of, assessments to be levied **against those who may be liable for assessments.**

It is equally clear, however, that such judgments by the courts of New York do not adjudicate the liability of any defendant for such assessments, as is clearly pointed out in a large number of cases cited by the Supreme Court of Georgia. (See R. 88, Division Two of Court's opinion.)

The sole and controlling question in the case is this: Did defendant policyholders, by the mere acceptance of the insurance policy issued to them in Georgia in the form of an ordinary insurance contract, knowingly and voluntarily become members of Auto Mutual Indemnity Company of New York, so as to become liable for the assessments provided for by the statutes of New York and the charter and by-laws of said company?

To put the question in another way, it might be stated as follows: Does the statute law of New York enter into an ordinary insurance contract made in Georgia so as to create the membership relation which under the New York law carries with it the liability to assessment, or must that relation be first created by the conventional act of the parties, whereupon the members become bound by the laws of New York defining their liability?

We submit that the question here raised is of major importance. Opposing counsel insist that the mere acceptance by any person in Georgia of any type of a policy issued by a mutual insurance company of New York of itself rendered such person a member of the association and therefore liable to assessments.

We submit that this question is entirely new. No case

cited by opposing counsel (excepting those involved in this same liquidation) is analogous to the situation here under discussion for the reason that in all of the cases cited the party against whom liability was claimed, at the time of accepting his policy or benefit certificate, had knowledge, actual or constructive, of the fact that he was becoming a member of a mutual association or benefit society, and none of the cases cited involved the mere acceptance of an ordinary standard insurance policy.

That this case involves a new question is easily demonstrated by a careful study of the decisions upon which opposing counsel admittedly and primarily rely.

In the case of **Supreme Council of Royal Arcanum v. Green,** 237 U. S. 531, it appears that the Massachusetts courts construed the charter of a local mutual benefit society, but the New York courts failed to give full faith and credit to such judgment. The question was not there raised as to whether the holder of the certificate became a member of the association. On the other hand, the court stated in part:

> "Said Green, the defendant in error, made application to become, and was admitted as, a member of this council,"

and it appears that his application made express reference to "the laws of the order," he therein agreeing "to conform in all respects to the laws, rules and usages of the order now in force, or which may hereafter be adopted by the same." See page 235. The certificate issued to him likewise recited that he should comply "with the laws, rules and regulations" of the order.

The foregoing is typical of all those cases involving fraternal orders, where it does not admit of doubt that a member has knowledge of the fact of his membership.

In the case of **Sovereign Camp W. O. W. v. Bolin**, 305 U. S. 65, it appeared that Bolin joined a Missouri lodge "and received a certificate of membership," which made certain recitals, and received a certificate which recited "that it was issued subject to all the conditions named in the constitution and laws of the fraternity." The Supreme Court of Nebraska held a certain by-law of the society to be void, and this court, through Mr. Justice Roberts, ruled that the decision of the Nebraska courts upholding the by-laws was binding upon the Missouri courts. We agree thoroughly with opposing counsel as to the unsoundness of the Missouri decisions there under review.

Mr. Justice Roberts made this statement:

> "Entry into membership of an incorporated beneficiary society **is more than a contract**, it is entering into a complex and abiding relation and the rights of membership are governed by the law of the state of incorporation."

This court said that the Missouri courts were not at liberty to disregard the fundamental law and **"turn a membership beneficiary certificate into an old-line policy** to be construed and enforced according to the law of the forum."

The foregoing language is significant. We submit that it is equally as improper for any court to attempt to **turn an old-line policy into a beneficiary certificate**, and thereby subject the purchaser of the same to liabilities of which he had no notice, as to "turn a membership beneficiary certificate into an old-line policy."

The case of **Chandler v. Peketz**, 297 U. S. 609, involved the liability of a stockholder in a Minnesota corporation under a statute of that state imposing assessment liability on stockholders. The Receiver of the corporation sued in Colorado, where the defendant demurred to the petition,

claiming that the action of the Minnesota courts was not binding on him. This court reiterated the principle that "one against whom the order of assessment is sought to be enforced is not precluded from showing that he is not a stockholder," but it is pointed out **that no such defense was there asserted.**

In the case of **Broderick v. Rosner,** 294 U. S. 629, a New York statute imposed a certain liability upon stockholders in New York banks, but a New Jersey statute virtually prevented the bringing of a suit in New Jersey by the New York Receiver upon such liability. This court said in part:

> "The statutory liability sought to be enforced is contractual in character. The assessment is an incident of the incorporation. Thus the subject matter is peculiarly within the regulatory power of New York as to such incorporation."

This court also said:

> "Obviously recognition could not be accorded to a local policy of New Jersey, if there really were one, of enabling all residents of the state to escape from the provisions of a **voluntarily assumed statutory obligation,** consistent with morality, to contribute to the payment of the depositors of a bank of another state of which they were stockholders." See 294 U. S., page 644.

We wish here to point out that cases involving the purchaser of stock in a corporation are not controlling in a case such as this, in so far as the question of the **personal liability** of the defendant is concerned. A stockholder is in all cases one of the owners of the corporation and one of the persons controlling its operations through directors and officers. The purchaser of stock must take cognizance of the fact that there is a charter for the corporation in the state named, and that the laws of such

state and the charter granted pursuant to such laws impose obligations upon the stockholders. Likewise, a person signing an application to, and joining, a fraternal order knows that he is becoming a member and knows that he will be subject to the same rules and liabilities that govern the other members.

In the instant case the parties sought to be charged did nothing but purchase an ordinary standard insurance policy.

We find no decided case where the policyholder is sought to be subjected to liability because of the mere acceptance of such a policy. We have found no decision which cannot be easily and readily distinguished upon its facts from the case at bar. That group of cases involving fraternal orders invariably discloses that the party sought to be assessed had knowledge, both actual or constructive, or both, of the fact of his membership and in practically every case expressly assumed the obligations of such membership. As pointed out above, the defendants in this case do not occupy the status of a stockholder in a corporation, neither do they occupy the status of a person **accepting what purports to be a mutual assessment policy.**

The real point is this: The particular policy here under consideration was not sufficient to render the person receiving it a member. The Georgia Supreme Court did not express any doubt as to the resulting liability of Georgia policyholders, if they had become members of the New York Insurance Association. Did the acceptance of this particular policy by a person in the State of Georgia, without more, constitute such policyholder a member? We submit that it did not.

IV.

THESE DEFENDANTS DID NOT UNDER THEIR CONTRACTS BECOME MEMBERS OF THE ALLEGED MUTUAL INSURANCE COMPANY.

It is necessary to observe the distinction between such a mutual casualty insurance company, as the Auto Mutual Indemnity Company, and various types of co-operative associations, fraternal orders, lodges, benefit associations and like associations which operate on the assessment plan. The Auto Mutual Indemnity Company does not operate on **an assessment plan.** Its policies are issued on a fixed premium in the same manner as other liability policies are issued. With this distinction kept in mind we feel that the decisions may be reconciled.

In **Section 250,** of his work on Insurance, Mr. Couch points out that mutual insurance companies may be divided into two classes, one class doing an insurance business, the other class being mutual societies or associations which have a social, benevolent, or like character, but whose prevalent purpose is that of insurance. In **Section 251,** the Author states:

> "And in New York a mutual company may issue policies for a fixed cash premium without liability upon the part of the insured to contribute further. In fact, the more generally accepted rule seems to be that the fact that cash premiums are paid, without further liability, is perfectly consistent with the mutual principle, but there is authority to the effect that where the premiums are paid wholly in cash, that is, where the policies are issued on a **cash premium basis,** the insured does not become a member of the insurer society or corporation, and in such a case the plan is not that of mutual insurance."

Speaking of the distinction between mutual companies

and benefit societies and whether or not they are insurance companies the same author says in **Section 253:**

> "Thus it has been said that the question must be determined by the language of the **contract** and the character of the business **transacted regardless of any name by which it is called and whatever** may be the association's name."

In Section 588, under the Title "**Assessments and Dues**" the Author states:

> "Likewise, the questions whether, or to what extent, assessments are debts, depends entirely upon the nature of the organization and **the entire contract between the parties.**"

In Section 590, it is stated:

> "And, according to an Illinois decision, where a mutual benefit company accepted cash for the premium, the insured did not become a member, and sustained to it **no different relations than he would have sustained to a stock company.**"

In Section 592, it is stated:

> "Again, an assignee is not liable to assessments **where he has not agreed to become a member, and is under no contract to assume the liabilities of the assignor to the company, or to pay assessments.**"

In Section 595, the following is stated:

> "The plans or schemes of mutual and fraternal insurance are so many and different, and the contracts so variant, that no more definite rule can be formulated for determining when and how an assessment may be levied than the general one **that the terms of the contract, when valid, must govern in all cases.**"

In Section 595 (a) it is stated:

> "An assessment cannot be validly made unless the necessity therefor properly and legally arises within the contemplation **of the contract** therefor, since it is

upon such conditions that the members have promised to contribute."

The case of **Craig v. Western Life Insurance Company,** 116 S. W. 1113, holds as follows:

> "The right of an assessment life insurance company to assess its policyholders is **strictly construed** and it can only be exercised when the conditions prescribed **in the contract of insurance** exist. Members of a mutual insurance company cannot be assessed to pay demands **for which their contracts do not make them responsible.**"

This principle is recognized in New York in the case of **Beha v. Weinstock,** 160 N. E., page 17, which says:

> "Every member * * * shall be liable for his proportionate part of any assessment laid by his corporation in accordance with law **and his contract.**"

We recognize, of course, that in many cases the terms of the insurance contracts are such as to make applicable the statutes of foreign states and the charters and by-laws of the company.

The principle (as applying to stockholders) is well expressed in 23 **Harvard Law Review,** at **page 38,** in the following language:

> "In nature, nevertheless, this liability is a hybrid. It has both contractual and statutory features, and yet it is neither contractual nor statutory. It is incidental to membership in the corporation. It is imposed, irrespective of either knowledge or conscious assent, on all who become stockholders. **On the other hand, no person can be made a stockholder without his own consent. No one, therefore, becomes subject to this liability unless he voluntarily becomes a member of the corporation.** This assent creates the contractual element of the liability, bringing it within the protection of the constitutional prohibition in regard to impairing the obligation of contracts."

In passing, and touching upon the question of the stockholders' consent, we call attention to the fact that certain provisions of the New York Insurance Laws requiring the policy to contain provisions for assessments were violated by Auto Mutual Indemnity Company, and such provisions were intentionally or unintentionally omitted from the policy. We refer to Section 346 of the New York Insurance Laws, reading as follows:

> "**The Corporation shall in its by-laws and policies fix the contingent mutual liability of the members** for the payment of losses and expenses not provided for by its admitted assets."

V.

THE NATURE OF THE POLICY ISSUED DID NOT CONSTITUTE THE POLICYHOLDERS AS MEMBERS.

We invite a very careful reading of the policy (R. 48). At the top of the face of the policy appear the words "Auto Mutual Indemnity Company, New York, New York." The policy bears all the earmarks of a standard insurance policy, the insurer being referred to as "The Company" and the policyholder being referred to as "The Insured," and it will be noted that the word "Insured" is used sixty-three (63) times and the word "Company" forty-two (42) times in the face of the policy.

At no place in the policy is it stated that Auto Mutual Indemnity Company is "a mutual insurance company established under the laws of New York," the closest approach to the above being the words "a mutual insurance company."

Condition 11 refers to the annual premium, and Condition 15 reads as follows:

> "By acceptance of this policy the named insured

> agrees * * * that this policy embodies all agreements existing between itself and the company or any of its agents relating to this insurance."

The most casual reading of this policy in its entirety would cause even an insurance expert to conclude that it was nothing but an ordinary standard commercial old-line policy with a flat premium. Condition No. 14 points out to the policyholder that he may participate in dividends, but omits any reference to assessments. No reference to membership is made in the face of the policy. A vague reference is contained in fine print on the back of the policy in the statement that the holder of it "is entitled to vote either in person or by proxy at any and all meetings of said company." Reference is made in this printed matter on the back to "the contingent liability of the named assured under this policy," but even there no mention is made of any liability by the assured as a member.

While we will subsequently discuss the matter printed on the back of the policy, we submit that the matter contained in the face of the policy does not constitute the policyholder a member. The closest approach to anything constituting the policyholder a member would be the language in the policy, "a mutual insurance company, herein called the Company." That language, however, does not under the decided cases make a person accepting the policy a member of the company and thereby subject to assessment.

VI.

EFFECT OF THE WORD "MUTUAL" IN THE POLICY.

The Supreme Court of Georgia and this court naturally take cognizance of the fact that there are in this country a great many mutual companies whose policies are not

assessable, for example, Penn Mutual Life Insurance Company and others. The court will also take cognizance of the fact that many mutual companies pay losses only out of funds paid in by the policyholders without any liability for assessment against them, and that Mutual Companies have capital assets contributed by organizers or subscribers.

In their brief, on page 6, opposing counsel state:

> "The mutual nature of the company appears from its name, from the profit-sharing provisions in the base of the policy and on the back of the policy is a specific recitation, etc."

We call attention to the fact that profit-sharing provisions are equally applicable to nonassessable policies, it being common knowledge that millions of policyholders receive dividends upon all types of insurance policies, whether assessable or not. The question of the recitals on the back of the policy are elsewhere covered in this brief, it being definitely established in Georgia and in most other jurisdictions that recitals on the back of the policy do not constitute a part of it (See R. 95, Decision of Georgia Court). The question therefore narrows itself down as to whether as contended, "the mutual nature of the company appears from its name," and to go one step further, "Does the mere word 'mutual' in the name of the company, without more, render its policyholders liable to assessment?" We submit that more than the mere mutual nature of the company is required, and that the policyholder must be charged with knowledge that the company is a mutual assessment company, and that the policy issued renders the policyholder liable to assessment.

VII.

THE POLICY HAVING BEEN ISSUED IN DIRECT VIOLATION OF LAWS OF NEW YORK, THE POLICYHOLDER CANNOT BE HELD LIABLE FOR ASSESSMENT.

As above pointed out, Section 346 of the New York Insurance Laws (See R. 9, 10, 44) definitely provides that such a corporation "shall in its by-laws **and policies** fix the contingent mutual liability of the members." It also provides that assessments, even those levied by the Superintendent of Insurance in case of liquidation, "shall be for no greater amount than that specified in the policy or by-laws." The law contemplated that assessments should be recited not only in the by-laws but in the policies, and the assessments should be no greater than that specified in one or the other, which of course means that, although the by-laws might authorize a specified assessment, the policy could provide a smaller amount than authorized by the by-laws.

The question arises as to the legal effect of policies issued in Georgia in direct violation of the laws of New York. Shall the penalty be inflicted upon the innocent purchaser of the policy in Georgia, or upon the company in New York?

The rule is well settled by the courts of this country, including those of New York State, that:

> "The court will, under certain circumstances, relieve a party to a contract which the other party was prohibited by statutes from making."

See **Irwin v. Currie**, Court of Appeals of New York, 64 N. E., page 161, and citations.

In citing another New York case, the court in the case above cited, said:

"In that case the court reached a conclusion that while the other party to the contract with the bank was a party to a contract made in violation of statute, nevertheless it was not equally culpable with the bank, and therefore was entitled to the assistance of the court to relieve it."

The court said also:

"We have preferred to rest our decision upon the broader ground that this defendant cannot invoke his violation of law for the purpose of retaining monies which he agreed plaintiff should have, and but for which agreement would have come into defendant's possession."

In the instant case, can the New York insurance company unlawfully omit all reference to assessments from its policies, sell them to innocent purchasers in other states, and then recover upon the basis of the policies being assessable?

In a case involving an insurance policy issued by a mutual company where the terms of the policy are inconsistent with the by-laws the Supreme Court of Maine in the case of **Greenlaw v. Aroostook County Patrons Mutual Fire Insurance Company,** 105 Atl. Rep. 116, stated:

"The tender and delivery by it of the several policies was tantamount to a declaration in relation to each that there were no by-laws inconsistent with their terms."

The fact that the company might be a mutual company does not prevent estoppel being urged against it. **New York Life Insurance Company v. Street,** 265 S. W., p. 97.

VIII.

THE LIQUIDATOR HAS NO GREATER RIGHT TO RECOVER AGAINST POLICYHOLDERS THAN THE COMPANY HAD PRIOR TO LIQUIDATION.

That the foregoing statement is correct would seem to be self-evident. The Liquidator took over the affairs of the corporation and stood in the shoes of the Board of Directors. He cannot enforce an assessment liability which they themselves could not have enforced. The New York courts have conceded the above to be a correct statement in a decision involving the same insurance laws as are involved in the instant case.

In the case of **Beha, Superintendent, v. Breger**, 223 N. Y. Supp. 726, the court said in part:

> "The fact that there has been a liquidation of the corporation, and that the affairs are in the hands of a public officer or representative of the court, cannot in and of itself create a liability against a policyholder **contrary to his contract.**"

The same principle is stated in the case of **Blackwell v. Mutual Reserve Fund Life Association** (N. C.), 53 S. E. 833, 834-835:

> "The liability of the members of the mutual insurance companies upon their premium notes is not increased by reason of the insolvency of the corporation and the appointment of a receiver, since the receiver is merely substituted in place of the directors of the company and vested with their rights and nothing more."

IX.

RESPONDENTS ARE BOUND ONLY BY POLICY PROVISIONS IN FACE OF POLICY.

It should be borne in mind that the policy issued to the defendants at no place in its face mentions or refers to assessment liability. The vague reference (R. 48) to "contingent liability" on the back of the policy is not a part of the policy. Section 56-213, Annotated Code of Georgia, requires all contracts of insurance to be evidenced by a policy of insurance in writing, print, or both. The rights of the parties are stated in that section to be governed by the terms, stipulations and conditions appearing on the face of the policy. There are several other code sections requiring that insurance policies be in writing. These sections 56-811 and 56-904 relate to fire and life insurance companies. However, they indicate a definite public policy requiring that insurance contracts be in writing. Similarly, statutory enactments indicate a policy of the Georgia law to require that assessments be plainly set forth in the policy contract. See Section 56-313 and Section 56-1502, Annotated Code of Georgia. These sections relate to fire and fraternal associations. The decisions of the Appellate Courts of Georgia amply indicate a public policy of requiring that the entire contract be in writing.

> **Northwestern National Insurance Company v. Southern States Phosphate Company**, 20 Ga. App. 506 (Headnote 4);
> **Electric City Lumber Company v. New York Underwriters Insurance Company**, 43 App. 355. 18 Ga.

In a very recent case Judge Sibley of the Fifth Circuit Court of Appeals held:

> "In Georgia by statute a contract of fire insurance must be in writing, Ga. Code Section 56-801, and this

is apparently true of other contracts of insurance. Section 56-213. The contract must be wholly in writing and not partly in parol." See cases cited. **D. G. Jacobs v. Merchants Assurance Corporation of New York,** 99 Fed. (2nd) 655.

The plaintiff in this case is proceeding on a policy issued in direct violation of Section 346 of the statutes of New York above set forth. It was issued contrary to the laws of New York and to the laws of Georgia if the Company intended that it be an assessable policy. Neither in the face of the policy nor on the back of the policy is any reference made to the charter or by-laws of the Company or to any liability for assessment.

The case of **Dwindell v. Kramer,** 92 N. W. 227, involves such a similar statement of facts to those involved here that we refer the court to that case in its entirety. In that case the contract refers to the applicable law, by-laws and application, which are made a part of this contract. The court held that the policyholder in such company is liable to assessment—

> "For losses not simply in accordance with law, but in accordance with his contract. Any such company may fix the contingent mutual liability of its policyholder not merely by its by-laws, but by its policies and the total amount of the liability of the policyholder **shall be plainly and legibly stated in the face of each policy.**"
>
> "We accordingly hold that the defendants are not liable upon this policy contingently or otherwise in any amount in excess of the cash premium therein named."

The petitioner here would control the obligations, rights, powers and duties of respondents by the very nature of the insurance company. This contention is answered in the

case of **Baker v. Sovereign Camp W. O. W.**, 116 S. W. 513, in which it is said that:

> "It was the character of the insurance and not the insurer that determined what defenses could be made."

In that case it was held that the Missouri courts were not required under the full faith and credit clause of the Constitution to follow a Nebraska Supreme Court decision construing an old-line policy to be a fraternal insurance policy.

X.

THE RULINGS OF THE SUPREME COURT OF GEORGIA CONSTRUING A CONTRACT MADE IN THE STATE OF GEORGIA ARE BINDING AND FINAL.

We wish to quote to the court from the case of **Wilhelm v. Security Benefit Association**, 104 S. W. (2nd) 1042:

> "Defendant contends that if it is held in Missouri to be liable as an old-line company when the certificate is recognized in Kansas, the home of the corporation, to comply with the fraternal insurance laws of that state, it would be violative of Section 1, Article IV, of the Constitution of the United States. That clause has been stretched by judicial interpretation to apply to a variety of peculiar situations, but we have been referred to no judicial decision holding that it permits the State of Kansas to prescribe the form of insurance contracts that may be sold in Missouri.
>
> "It is equally frivolous to argue that a decision holding defendant liable as an old-line company on this particular policy is equivalent to destroying its entity as a fraternal company."

We call to the attention of the Court the case of **Pink**

v. Georgia Stages, Inc., 35 Fed. Supp. 437. This case involves the identical question here under discussion. The court in a well-reasoned and amply supported opinion declined to enforce the assessment against a defendant in that case identical in position with the defendants here.

In holding that the defendants did not become members of the New York corporation the Georgia court did not define or decide the legal incidents of membership. Admittedly the incidents of membership are controlled by the New York law, and the interpretation of the New York law by the New York courts. Nor did it invade the province of the New York law or courts to the extent of dealing with the distribution of the assets of the New York corporation in liquidation. To have done either in disregard of the New York laws and court proceedings would have violated the Federal Constitution, and would have raised the Federal Question upon which this court has taken jurisdiction.

Its decision was narrowly confined to the holding that the act of making an ordinary insurance contract in Georgia, which states that it embodies all agreements existing between the parties, does not constitute the insured a member of the New York insurance corporation in the absence of notice to that effect contained in the contract, and that the liability to assessment which is an incident of membership does not attach merely by reason of the acceptance of the policy.

Since the defendants did not become members merely by accepting the insurance policies in Georgia, and since they did not otherwise contract to become liable to assessment, they cannot be assessed.

In construing and determining the effect of the Georgia contract, as distinguished from the consequences of mem-

bership, the Georgia Supreme Court was dealing with a question within its sole and final jurisdiction. The Federal question urged by appellant simply is not in the case.

The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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